NO. 46783-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

BURNICE R. THOMPSON,

Appellant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The appellant, Burnice Thompson, was convicted at trial of Theft in the First Degree, RCW 9A.56.030, and two counts of Medicaid False Statement, RCW 74.09.230. At sentencing, the trial court rejected Thompson's argument that her two convictions for Medicaid False Statement were barred by the double jeopardy clauses of the state and federal constitutions and the merger rule. This Court should affirm because the legislature intended Theft in the First Degree and Medicaid False Statement to be punished as separate crimes. Alternatively, the two crimes constitute separate criminal acts, thus there can be no double jeopardy violation.

II. ISSUES PRESENTED

A. Did the legislature intend the crimes of Theft in the First Degree and Medicaid False Statement to be punished as separate crimes?

B. This Court has already held that the crimes of Theft in the First Degree and Medicaid False Statement do not constitute the same criminal conduct under similar facts. Should this Court follow this precedent and thereby conclude that punishment for both crimes does not violate double jeopardy?

III. STATEMENT OF THE CASE[1]

The appellant, Burnice Thompson, entered into a Client Service Contract with the Home and Community Services branch of the Washington Department of Social and Health Services to serve as an Individual Provider under the State's Medicaid Program. RP 30-40, 315. Her client was T.H. [2] RP 54, 57, 300. T.H. required daily home care, for which Thompson was authorized to claim payment for up to 304 hours a month. RP 44, 54-57, 91, 158, 176-177, 240, 274. This in-home program is an authorized Medicaid Program under RCW 74.09. RP 236.

In January 2011, T.H. was admitted to a hospital, but Thompson claimed full payment for that month anyway. RP 70, 74, 308. As a result, when the Department determined that Thompson was claiming payments for time not worked, it issued an "overpayment" requiring Thompson to pay back the amount she had not earned. RP 70-72. The Department reminded Thompson "that she could not bill for hours when the client is not home." RP 73.

On November 24, 2012, T.H. died. RP 65, 242, 299-300, Thompson filed for unemployment on December 13, 2012. RP 221-223, 305. However, even after T.H.'s death, Thompson continued

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[1] Unless otherwise indicated, references to the Report of Proceedings are to the transcripts entitled Volumes I-II.

[2] The client is being referred to by initials to protect health information.

submitting invoices for payment for two months (December 2012 and January 2013). RP 67. She did this by making false statements to the Medicaid Program in claiming her full allotment of 304 hours (plus mileage and vacation hours) both on December 31, 2012 (for December 2012) and on February 4, 2013 (for January 2013). RP 178-180, 288-289, 301-304, 306-307. Thompson received unauthorized Medicaid payments in excess of $5,000. RP 152-170, 300, 317.

The State charged Thompson with one count of Theft in the First Degree, RCW 9A.56.030, and two counts of Medicaid False Statement, RCW 74.09.230. CP 94-96; RP [07-16-14] 6-7. The State alleged she unlawfully obtained over $5,000 from the Medicaid Program in payment for work she never performed. The State also alleged she submitted two false statements to the Medicaid Program.

Thompson proceeded to a bench trial before the Honorable Christine Schaller. CP 143-147; RP 9-375. After a two-day trial, the court made Findings of Fact and Conclusions of Law finding Thompson guilty as charged of all three counts. CP 147, 203-226; RP 350-372.

Prior to sentencing, Thompson filed a motion to dismiss both counts of Medicaid False Statement. CP 168-175. She argued that these convictions were barred by double jeopardy and the merger doctrine. *Id.* The trial court denied Thompson's motion "because the Legislature

intended to punish Medicaid False Statement and theft separately." RP [09-24-14] 18.

The Court sentenced Thompson to community service under the First-Time Offender Waiver option, RCW 9.94A.650. CP 227-234; RP [09-24-14] 27-34. This appeal follows. CP 235.

IV. ARGUMENT

A. The Legislature Intended The Crimes of Theft In The First Degree And Medicaid False Statement To Be Punished As Separate Crimes.

Under the Washington State Constitution, "No person shall . . . be twice put in jeopardy for the same offense." WA CONST Art. I, § 9. The United States Constitution contains a similar provision. USCA CONST Amend V. The two provisions provide identical protection. *In Re Orange*, 152 Wn.2d 795, 815, 100 P.3d 291, 301 (2004). While "multiple charges arising from the same criminal conduct" are allowed, "[c]ourts may not . . . enter multiple convictions for the same offense without offending double jeopardy." *State v. Freeman*, 153 Wn.2d 765, 770, 108 P.3d 753, 756 (2005). When a person is convicted of multiple crimes, the ultimate question to be determined is whether the *legislature* intended the crimes to be the same offense. *Id.* at 771 (quoting *Orange*, 152 Wn.2d at 815). Review for double jeopardy claims is de novo. *Id.* at 770.

Theft in the First Degree is a statute rooted in the common law. It was codified in its present form in 1975 as RCW 9A.56.030. Four years later, in 1979, the legislature enacted a separate Medicaid False Statement statute and codified it as RCW 74.09.230. Thompson cites no authority that the legislature, in creating these separate offenses, intended for the conviction of and punishment for these crimes to constitute double jeopardy.

When analyzing double jeopardy, the Court first considers "any express or implicit legislative intent." *Freeman*, 153 Wn.2d at 771-772. Here, when the legislature created the separate crime of Medicaid False Statement four years after codifying the crime of Theft in the First Degree, it showed its intent to create a *separate* crime. Furthermore, this Court's established double jeopardy tests also show there was no violation in this case. *Id.* at 772-773.

1. The Crimes Of Theft In The First Degree And Medicaid False Statement Contain Different Elements And In This Case Required Different Evidence And Proof Of Different Facts

The first test in Washington for double jeopardy is derived from *Blockburger v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932). *Freeman*, 153 Wn.2d at 772. Under this "same elements" test, there is no double jeopardy "[i]f each crime contains an

element that the other does not." *Id.* This test is not applied by "consider[ing] the elements of the crime on an abstract level," but instead is applied by considering "whether each provision *requires proof of a fact* which the other does not." *Id.* (quoting *Orange*, 152 Wn.2d at 817 (quoting *Blockburger*, 284 U.S. at 304)) (emphasis added by *Orange* Court). In other words, the elements are considered not just as written but "as charged and proved" in a particular case. *Freeman*, 153 Wn.2d at 777.

In Washington, the *Blockburger* test is modified from a "same elements" to a "same evidence" test, under which double jeopardy is implicated where "'"*the evidence required* to support a conviction upon one of [the charged crimes] would have been sufficient to warrant a conviction upon the other."'" *Orange*, 152 Wn. 2d at 820 (quoting *State v. Reiff*, 14 Wash. 664, 667, 45 P. 318, 319 (1896) (quoting *Morey v. Commonwealth*, 108 Mass. 433, 434 (1871))) (emphasis and bracketed words added by *Orange* Court). However, "the mere fact that the same *conduct* is used to prove each crime is not dispositive," *Freeman*, 153 Wn.2d at 777. *See also State v. Valentine*, 108 Wn. App. 24, 29, 29 P.3d 42, 45 (2001) (holding that convictions for assault and attempted murder violated double jeopardy because "proof of attempted murder committed by assault will always establish an assault"); *State v. Potter*, 31 Wn. App. 883, 888, 645 P.2d 60, 62 (1982) (holding that conviction for reckless

driving violated double jeopardy when the defendant had also been convicted of reckless endangerment because "proof of reckless endangerment through use of an automobile will always establish reckless driving")[3].

Washington courts have distinguished cases like *Valentine* and *Potter* from cases where different evidence is required to support a conviction on each crime. *See State v. Baldwin*, 150 Wn.2d 448, 456, 78 P.3d 1005, 1010 (2003) (holding that convictions for identity theft and forgery not barred by double jeopardy because "proof of theft of identity would not *necessarily* prove forgery and, thus, the two crimes are not the same in law")[4]; *State v. Nysta*, 168 Wn. App. 30, 48, 275 P.3d 1162, 1172 (2012) (holding that convictions for felony harassment and rape in the second degree are not barred by double jeopardy because while a "threat to kill was the evidence *required* to support the felony harassment conviction," it "was not evidence *required* to prove second degree rape"); *State v. Cole*, 117 Wn. App. 870, 877, 73 P.3d 411, 414 (2003) (holding that convictions for attempted robbery in the first degree and assault in the second degree not barred by double jeopardy "because in proving a use of

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[3] The Court in *Potter* also stated that the *Blockburger* test "should be utilized with extra care" where the two criminal statutes are contained in separate codes. *Id.*

[4] The Court in *Baldwin* also relied on the lack of clear legislative intent to treat the crimes as the same and on the fact that the victims of the crimes were different. *Id.* at 456-457.

a knife to be the substantial step toward first degree robbery, there will not necessarily be proof that the knife used actually was a deadly weapon").

In this case, for double jeopardy principles to be implicated under this "same evidence" test, the evidence required to support a conviction of First Degree Theft would therefore have had to be sufficient to warrant a conviction for Medicaid False Statement. *See Orange*, 152 Wn. 2d at 820. Thompson acknowledges, as she must, that double jeopardy does not apply under this "same evidence" test because "[t]he two offenses contain different elements." Brief of Appellant at 7. One does not always commit Medicaid False Statement when committing First Degree Theft. First Degree Theft requires proof that Thompson "wrongfully obtain[ed]" or obtained "[b]y color or aid of deception" property worth over $5,000, with intent to deprive, while Medicaid False Statement requires proof that Thompson knowingly made a false statement regarding a material fact or knowingly concealed a material fact with respect to an application for payment under a "medical care program authorized under . . . chapter [74.09]." RCW 9A.56.020(1)(a), (b); RCW 9A.56.030(1)(a); RCW 74.09.230(1), (3). Thus, the evidence required to prove First Degree Theft would not by necessity have proven Medicaid False Statement. Accordingly, as Thompson herself acknowledges, under the modified-*Blockburger*, same evidence test, there is no double jeopardy here.

2. The Merger Doctrine Does Not Apply Because The Theft Conviction Is Elevated To First Degree By Proof Of A Larger Amount Of Money Stolen And Not By Proof Of Multiple False Statements

The next test cited in *Freeman* for double jeopardy is "the merger doctrine," which applies "when the degree of one offense is raised by conduct separately criminalized by the legislature." *Freeman*, 153 Wn.2d at 772-773. In this case, the Court "presume[s] the legislature intended to punish both offenses through a greater sentence for the greater crime." *Id.* at 773. Thompson argues that merger applies in the present case because the State was required to prove *both* false statement charges in order to establish Theft in the First Degree. Brief of Appellant at 8-10.

However, the elevation of the crime to Theft in the First Degree is based upon the total amount of *money* stolen being over $5,000, RCW 9A.56.030(1)(a), not upon additional false statement(s). Thus, the case is unlike *State v. Parmelee*, in which this Court held that two of three protection order violations merged into a felony stalking conviction "because the State was required to prove facts to support at least two of the protection order violation convictions in order to establish facts sufficient for a felony stalking conviction." *State v. Parmelee*, 108 Wn. App. 702, 711, 32 P.3d 1029, 1034 (2001). In Thompson's case,

since the key fact elevating the theft crime to first degree is the amount of money stolen and not the false statements, merger does not apply.

For the same reason, Thompson's case is distinguishable from cases involving Kier and Zumwalt, whose convictions for assault in the second degree were found to merge with their convictions for robbery in the first degree, since to elevate the robberies to first degree, the State had to prove the assaults. *State v. Kier*, 164 Wn.2d 798, 803-807, 194 P.3d 212, 213-216 (2008); *Freeman*, 153 Wn.2d at 777-778.

Thompson's case is, however, analogous to that of Beaver in *State v. Esparza.* There, this court rejected Beaver's argument that his conviction for assault in the second degree merged with his conviction for attempted robbery in the first degree, since the elevation of the attempted robbery to first degree did not necessarily require proof of the assault. *State v. Esparza*, 135 Wn. App. 54, 64-66, 143 P.3d 612, 616-618 (2006). Similarly, in *State v. Knight*, this Court held that a conviction for assault in the second degree did *not* merge with a conviction for robbery in the first degree because in that case, the robbery was elevated to first degree not by evidence of the later assault but by evidence that the defendant's accomplice was armed with a deadly weapon. *State v. Knight*, 176 Wn. App. 936, 951-956, 309 P.3d 776, 785-787 (2013).

Like in *Esparza* and *Knight*, the elevation of Thompson's theft conviction to first degree did not depend upon proof of either or both Medicaid False Statement crimes. Instead, the elevation was based upon proof that the total dollar amount wrongfully obtained was over $5,000. Thus, the merger doctrine does not apply here.

3. The Crimes Of Theft In The First Degree And Medicaid False Statement Have Independent Purposes And Effects

Under the final test for double jeopardy, "even if on an abstract level two convictions appear to be for the same offense or for charges that would merge, if there is an independent purpose or effect to each, they may be punished as separate offenses." *Freeman*, 153 Wn.2d at 773. For example, "when the defendant struck a victim *after* completing a robbery, there was a separate injury and intent justifying a separate assault conviction, especially since the assault did not forward the robbery." *Id.* at 779. Similarly, Division One of this Court noted in *State v. Cole* that

> the assault and robbery statutes do not address identical evils. The assault statutes are directed at assaultive conduct. The robbery statute "is designed to discourage the taking of property from the person of another by use or threatened use of force and serves to protect individuals from loss of property and threat of violence to their persons.

State v. Cole, 117 Wn. App. 870, 877-878, 73 P.3d 411, 414-415 (2003) (citations omitted) (quoting *State v. Vermillion*, 112 Wn. App. 844,

861-62, 51 P.3d 188, 197-198 (2002)). In contrast, Division One "reasoned that the assault and murder statutes are directed at the same evil, assaultive conduct," in finding that double jeopardy *did* apply there. *Valentine*, 108 Wn. App. at 28 (citing *State v. Read*, 100 Wn. App. 776, 791-92, 998 P.2d 897, 905-906 (2000), *review granted on other grounds*, 142 Wn. 2d 1007, 13 P.3d 1065 (2000)).

Here, Thompson was a trusted healthcare provider under the State's Medicaid program. As such, her false statements had an independent effect on the integrity of the State's Medicaid system, separate and apart from the theft. It is for this reason of maintaining the integrity of the Medicaid Program, it would seem, that the legislature enacted the Medicaid False Statement statute in 1979.

At the core of each double jeopardy test is legislative intent: "[t]he process [of determining whether double jeopardy applies] is recursive, returning to the legislature's intent again and again," *Freeman*, 153 Wn.2d at 777. Here, it is apparent that the legislature sought to protect the integrity of the Medicaid system with a new statute enacted in 1979 that was intended to provide punishment for submitting false information to that system *separate* from that already provided by the generic theft statutes in the criminal code for wrongfully obtaining funds. The two statutes address *different* evils.

Thus, because the legislature intended to create a separate crime when it created the crime of Medicaid False Statement four years after codifying the crime of First Degree Theft, Thompson's claim of double jeopardy fails.

B. Alternatively, Thompson's Convictions For Two Counts Of Medicaid False Statement Are Not Barred By Double Jeopardy Because They Were Not Based On The Same Criminal Conduct As Her Conviction For Theft In The First Degree

In *State v. Wright*, Wright was, like Thompson, convicted of both Theft in the First Degree and multiple counts of Medicaid False Statement. *State v. Wright*, 183 Wn. App. 719, 724-725, 334 P.3d 22, 25 (2014). She then asked this Court to hold that Theft in the First Degree and Medicaid False Statement constitute "same criminal conduct" under the Sentencing Reform Act. *Id.* at 732. Division Three of this Court rejected this argument, reasoning that there was no evidence the crimes occurred at the same time and place. *Id.* at 734-735.

> [H]er theft . . . involved a series of transactions taking place on discrete dates—and those dates were consistently several days after she submitted the corresponding false telephonic invoice. . . . [T]he State correctly points out that Ms. Wright has not identified any evidence that the crimes were committed in the same place. It submits that "it defies common sense to suppose she placed the calls from her bank, the place she wrongfully obtained the funds.

Id. at 734 (quoting Brief of Respondent at 34).

This holding is particularly important because double jeopardy analysis does not even apply where the crimes are not based on the same criminal conduct. *State v. Daniels*, 183 Wn. App. 109, 119-120, 332 P.3d 1143, 1148-1149 (2014). As this Court explained,

> [w]hen a defendant makes a double jeopardy argument, we normally determine whether the legislature intended multiple punishments in the particular situation. . . . Here, however, we need not engage in this legislative intent analysis because we hold that Daniels is being punished for two separate criminal acts, not twice for the same act.

Id. at 119 n.9 (citation omitted).

Since Theft in the First Degree and Medicaid False Statement are not based on the same criminal conduct under *Wright*, double jeopardy cannot be argued here. *Id.* For this reason alone, Thompson's double jeopardy claim should be rejected.

V. CONCLUSION

For the above reasons, this Court should uphold Thompson's two

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convictions for Medicaid False Statement and find that they are not barred by the double jeopardy/merger doctrine.

RESPECTFULLY SUBMITTED this 23rd day of June, 2015.

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VI. CERTIFICATE OF SERVICE

I certify that on the 23rd day of June, 2015, I caused a true and correct copy of the Respondent's Brief to be served on the following in the manner indicated below:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 23rd day of June, 2015, at Olympia, Washington.

Darcie McMullin, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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